Exhibit D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff-Applicant,

v. 22-CV-06502

BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

Defendant.

Oral Argument

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New York, N.Y.
October 13, 2022
4:00 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

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(Case called; appearances noted)

THE COURT: Good afternoon. We're here for the motion to appeal. I assume not everyone at the table is going to talk but have you worked out who want to be the primary spokespersons?

MR. LEVIN: Yes, your Honor. I was going to start and give a brief explanation about who was going to talk and what we were going to talk about.

THE COURT: Sure. Why don't you go to the podium.

MR. LEVIN: Sure.

Your Honor, I and the other two counsel speaking today are speaking on behalf of all seven of the defendants below moving parties here. We're here separately, because the bankruptcy court below required separate briefing on all these matters, but we're --

THE COURT: She must have been a glutton for punishment.

MR. LEVIN: I don't want to make assumptions, your Honor, and we're glad that it's proceeded on a consolidated basis here.

We're going to divide the argument into three parts. I'm going to start with a review of the grounds for the motion for leave to appeal and -- two of the three grounds, and then Mr. Lack is going to take over on the substantive issue, the primary substantive issue on section 546(e). And Mr. Gottridge

is going to address what we're calling the separate securities contract issue.

THE COURT: All right.

MR. LEVIN: So, your Honor, as you well know, a motion for leave normally requires three factors, and I'm going to state them not in the usual order, because I'm going to discuss two of them out of order. First is whether there's a controlling issue of law; second, whether the decision of the issue would materially affect the advance -- advance the litigation below; and, third, whether there is a substantial ground for difference of opinion on that controlling issue of law. Courts have added an exceptional circumstances requirement, but, in the end, I think it's a practical question, your Honor.

The final judgment rule is important to prevent piecemeal litigation. We acknowledge that, but Congress enacted interlocutory appeals to provide some give in the joints on that where it made sense as a practical matter. And the courts have recognized --

THE COURT: Well, I think, from the briefing, the real dispute is on your third factor.

MR. LEVIN: Absolutely.

THE COURT: So you may want to turn to that.

MR. LEVIN: Fine.

Well, I'm going to just talk briefly about the

standard for the third factor. Mr. Lack is going to then address the substance of the third factor.

The Second Circuit has said there are two ways to -- two ways something can create a substantial ground for a difference of opinion. One is conflicting decisions. In this case, this Court's decision below on *Cohmad* was the only decision ever on this issue, so there can't be conflicting decisions, but the other ground the Second Circuit recognized --

THE COURT: I'm having trouble. Could you slow down a bit?

MR. LEVIN: The other basis for substantial grounds for difference of opinion is if it is an issue of first impression in the circuit, and if that's the case, the Second Circuit has also said in the *Flor* case --

THE DEPUTY CLERK: Spell that, please.

MR. LEVIN: *Flor*, F-l-o-r.

-- that the district court must analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue is truly one on which there is substantial grounds for dispute.

As I said, this is definitely an issue of first impression. It was when this Court decided *Cohmad* -- and this further interpretation of *Cohmad* that we are addressing today is similarly an issue of first impression. No other court has

addressed this application of 546(e) to innocent subsequent transferees. And as the trustee's dogged opposition to the implications of this Court's *Cohmad* ruling shows, it is a difficult issue, even though the trustee attempts to characterize it as just a simple interpretation.

Your Honor, with that, I turn it over to Mr. Lack. I did have one exhibit, just listing the 21 decisions that the bankruptcy court has already decided. That goes to the issue of materially advanced --

THE COURT: Please feel free to hand it up, and if I have any trouble with insomnia tonight, I'll know how to cure it.

MR. LEVIN: It's all on one page. It will make it easy.

THE COURT: Go ahead.

MR. LACK: Thank you, your Honor.

Substantial grounds for difference of opinion exist here, because the bankruptcy court's ruling on the -- misread this Court's decision in *Cohmad*, not only in these seven cases, but in --

THE COURT: Well, let me just make sure that you agree that other than the way that you're reading my decision, which I may agree with or I may disagree with, but other than that, there's really no other decision that's weighed in on the issue that you want to now appeal?

MR. LACK: That's correct. Other than Judge Morris' decision in the bankruptcy court which squarely dealt with the question of the innocent subsequent transferee, and your Honor's *Cohmad* decision which we believe, properly construed, would come to the opposite conclusion, there is no other decision.

THE COURT: Okay. Go ahead.

MR. LACK: And, as the chart you're just been given shows, there are 21 cases that so far have been effected by the misreading of *Cohmad* by the bankruptcy court. And in the absence of intervention by this Court, there will be scores of others that will be similarly misdecided, erroneously decided, because there are approximately 60 additional cases in the pipeline, in various stages of briefing, set for argument, from next week through the spring of 2023, raising exactly the same issue and the bankruptcy court has consistently decided adversely to the defendants.

I mean, the trustee here does not --

THE COURT: Let me interrupt you here on that point, because I'm glad you made me aware of those, you know, other matters in the pipeline. Well, while I make no guarantee, I will do my very best to get you at least a bottom line decision on these motions by the end of October. Hopefully, it will be more than just the bottom line. If it is the bottom line, of course, an opinion will follow in due course; but I do

understand the need for some expedition and, really, I wasn't planning on going trick-or-treating, so October 31 sounds like an open day.

MR. LACK: Thank you, your Honor. That would be appreciated.

I think, in the interest of judicial administration efficiency, that will be well worthwhile. The trustee here does not dispute that Madoff was a stockbroker, that Fairfield Sentry was a financial institution, or that the initial transfers from Madoff -- I'll refer to Bernard L. Madoff Investment Securities, LLC as just Madoff for simplicity. There's no dispute by the trustee that the initial transfers from Madoff to Sentry were settlement payments or in connection with a securities interest, and the trustee does not dispute with respect to the transfers that are at issue in these motions that they were all more than two years before the petition date and, therefore, cannot be pursuant under section 548(a)(1)(A) of the Bankruptcy Code. In other words, the section 546(e) Safe Harbor applies by its terms to the initial transfers from Madoff to Sentry. The transfers are on their face not avoidable.

But in *Cohmad* --

THE COURT: So what it sounded like you were saying, but maybe I misunderstood, is that the availability of a subsequent transferee to avoid as a defense to the trustee's

ability to avoid an initial transfer should turn on the knowledge of the subsequent transferee even though the subsequent transferee has an independent good faith defense. Am I understanding what you're saying?

MR. LACK: Not exactly, your Honor.

There are two aspects of this. There's two defenses. First, there's a defense to the initial transfer under 546(d). Then there's a defense to the subsequent transfer under 550(b). There's also a good faith for value defense.

Incidentally, in the initial transfer you also have good faith for value under 548(b) -- 548(c). I'm sorry. But the point here is, as your Honor recognized in *Cohmad*, and as other courts have said, that the subsequent transferee can raise the 546(e) defense to the initial transfer even if that defense was not raised by the initial transferee, as was the case here with Fairfield Sentry settled the claim against them. So even though the subsequent transferees also have a good faith defense, they also have the right, as a matter of due process, to raise the 546(e) defense as to the initial transfer, even if it wasn't raised by the initial transferee, as it wasn't by Fairfield Sentry here. So we --

THE COURT: You know, it's been a while since I decided *Cohmad*. I was practically just a judge in diapers at that time. But my recollection is that what I held there was that subsequent transferees who knew about the fraud could not

raise this defense to avoidance of the initial transfer. I don't know that I addressed, other than what you're saying by way of inference, the issue that you're now presenting.

MR. LACK: That's correct. That's correct, your Honor.

You addressed the question of the initial transferee having actual knowledge of Madoff's fraud, meaning knowing -- actually knowing that Madoff was not trading securities. You held an initial transferee who actually knew Madoff's fraud could not assert the 546(e) Safe Harbor, and you also held that a subsequent transferee that actually knew of Madoff's fraud could not assert the 546(e) Safe Harbor. But you did not specifically deal with the situation of the innocent subsequent transferee, and it is our position that the rationale, the reasoning of your decision in *Cohmad* makes it clear that had you reached that point, you would have decided that an initial -- an innocent subsequent transferee can indeed assert the 546(e) defense, because the innocent transferee is within the class of persons that Congress sought to protect by the section 546(e) Safe Harbor.

And it was only because those initial and subsequent transferees who had actual knowledge were not within the class of people Congress sought to protect, because they knew that there was not, in fact, a securities contract involved, that your Honor felt -- held in *Cohmad* that they could not assert

the 546(e) defense that would otherwise be available, because here it's conceded that absent the argument about an actual knowledge of the initial transferee, 546(e) would apply, because there's no doubt that there was here a transfer by a stockbroker to a financial institution in connection with a securities contract.

In fact, here there were two securities contracts involved: A contract between Madoff and Sentry and a contract between Sentry and the various defendants. And so the only question is is there something that would disable the particular defendants here, the subsequent transferees, from using the 546(e) defense.

And in *Cohmad* your Honor identified --

THE COURT: Why do we need this protection for your clients if they have the good faith defense?

MR. LACK: Well, because the good faith defense is a much weaker defense than the 546(e) defense. The 546(e) defense is a structural defense that arises in a situation where there is a transfer by a stockbroker in connection with a securities contract. It applies with only one exception, your Honor, to *Cohmad*, which is actual knowledge of Madoff's fraud. The 546 -- the good faith defense under 550(b) can be defeated by much less than a showing of actual knowledge. That's not the standard. The actual knowledge standard is a much more difficult standard to -- for the trustee.

In fact, the trustee does not plead to any of the defendants, subsequent transferee defendants before you had actual knowledge of Madoff's fraud. So it's a much better --

THE COURT: There is something a little odd, that the availability of a defense of avoidance of the initial -- of the initial transfer should somehow turn on the subsequent knowledge or innocence of a subsequent transferee years later.

MR. LACK: The way -- I think the best way to look at this, your Honor, is that the avoidability of the initial transfer depends on the structure, the participants, whether there's a qualifying participant and a qualifying transaction. That is what triggers the 546(e) defense. If you have a qualifying participant, such as a stockbroker or a financial institution and a qualifying transaction, such as a settlement payment or a transfer connection with securities contract, section 546(e) applies, except, as you said in *Cohmad*, if the defendant who is the subject of suit, the particular transferee, had actual knowledge of Madoff's fraud, in which case you ruled they could not assert the defense, because Congress was not seeking to protect them if they knew there wasn't actually a securities contract involved.

So it isn't a question of the -- the 546(e) defense, remember, the only -- the only exception to 546(e) is if it applies structurally, is for a claim for intentional fraudulent transfer under 548(a)(1)(A). There is no exception to 546(e)

that is based on the state of mind of the transferee. The only thing that triggers an exception is the intent of the transferor in making the initial fraudulent transfer. But the transferee's mental state is irrelevant to 546(e), as written by Congress.

The only -- the gloss you put on 546(e) in *Cohmad* was, well, if in fact the defendant who's being sued actually knew that Madoff wasn't trading securities, then it makes no sense to give them a protection which was designed to protect the legitimate expectations of investors, that they were engaging in bona fide securities transactions. And certainly the defendants here had every reason to believe that the -- that the contracts between Madoff and Sentry were bona fide, that the contracts between Sentry and themselves were bona fide. They had no knowledge, and there's no allegation that they had any knowledge that Madoff wasn't trading securities.

So there's no reason to provide an exception for a Safe Harbor that would otherwise apply here, and that's why -- that was the reason it -- that this Court focused in *Cohmad* on the knowledge of the particular defendant. It was that the Safe Harbor existed as to the initial transfer. But the question was, was the particular defendant disabled from asserting, as your Honor put it in *Cohmad*, if the trustee sufficiently alleges that the transferee from whom he seeks to recover a fraudulent transfer knew of Madoff's security fraud,

that transferee cannot claim the protections of section 546(e) Safe Harbor.

And so your Honor should make clear and grant leave to appeal to make clear that, under *Cohmad*, a subsequent transferee that has -- does not have actual knowledge is not disabled from asserting a section 546(e) defense that would otherwise exist as to the initial transfer.

THE COURT: All right. Thank you very much.

There was one other person, yes, who wanted to speak --

MR. GOTTRIDGE: Yes, your Honor.

THE COURT: -- before we get to the defense.

MR. GOTTRIDGE: Good afternoon again, your Honor.

So there's really, as we say it, two holdings of *Cohmad* that we ask the bankruptcy court to apply, and Mr. Lack really addressed what we think is the first fundamental error of the bankruptcy court in that regard, which is that it really goes to this question of the *Cohmad* -- sort of the first *Cohmad* holding, which is based on actual knowledge.

As Mr. Lack said, it creates -- it's not an exception to the Safe Harbor, which I think everybody agrees these transactions are Safe Harbor. They meet all of the 546(e) prerequisites. The question is whether a particular defendant that's being sued had actual knowledge that Bernie Madoff wasn't trading securities, because such a defendant, as your

Honor ruled, doesn't have a reasonable expectation that an innocent one would have.

And the judge below, in our view, made a serious mistake, because what she did essentially was to say: I'm not even looking at what the subsequent transferee knew; if the initial transferee, Fairfield Sentry, is alleged to have knowledge, that's the end of the ball game for you; I don't even consider the actual knowledge of the subsequent transferee. Which, in our view, is entirely inconsistent with your Honor's ruling in *Cohmad*.

But there was also a second problem with what the bankruptcy court did, and that's what I'd like to focus on now. It really relates to the second *Cohmad* holding, if you will. We're calling it a separate securities contract holding. It starts at page eight of the Westlaw pagination of your Honor's *Cohmad* decision and kind of goes to the end. And what the Court said there was separate and apart from the customer agreements that BLMIS, the Madoff securities entity, had with Fairfield Sentry or another feeder fund, the requirement under 546(e) that there be a securities contract that has a relationship with the transaction that can be fulfilled for the very same transactions by multiple contracts.

And the Court actually said that, in the scenario that we have here, where a subsequent transferee defendant caused Fairfield Sentry to make the withdrawal that constitutes the

initial transfer, because it made a request to Fairfield Sentry that Fairfield Sentry -- for the redemption of its shares in Fairfield Sentry, in that scenario, 546(e) applies independently of whatever customer agreement existed between Madoff Securities on the one hand and Fairfield Sentry on the other, because you've also got -- and the Court found at page 8 that these were securities contracts under the meaning of 546(e).

You've got subscription agreements and you've got redemption requests and the agreements that relate to the redemption request. In this case, the trustee pleaded exactly what is required to fit. It just fits like a T to what your Honor held when your Honor explained at page 9 in the case, quote, in which the trustee alleges that a withdrawal of funds by an investment fund from its Madoff Securities customer account occurred because an investor in the fund sought redemption of its investment under the terms of its investment contract. The situation appears to fit within the plain terms of section 546(e), and that's exactly what the trustee has pleaded.

They pleaded here that the defendants entered into subscription agreements with Fairfield Sentry. They've pleaded that they subscribed for and got Fairfield Sentry shares, and they ultimately directed redemption requests to Fairfield Sentry. They even go on to plead that Fairfield Sentry honored

the redemption requests and withdrew funds from BLMIS accounts precisely "in order to pay" redemption as requested by the defendants.

And they even say that, as a result of the honoring of these redemption requests by Fairfield Sentry, "portions of the Fairfield Sentry initial transfers were subsequently transferred either directly or indirectly to or for the benefit of" each of the defendants to the subsequent transferee defendants.

So the Court's holding, the second holding, the separate securities contract holding, is entirely satisfied that the scenario that your Honor laid out matches exactly the fact pattern alleged by the trustee. And the trustee says, well, there may be factual issues. There are no factual issues. Everything that makes out the defense and makes out this separate pathway to 546(e) protection is from the trustee's own allegations. You don't need to go any further.

Now, at the end, in the concluding paragraph of the opinion, in *Cohmad*, at page 10, this Court said that it was the bankruptcy court's obligation to adjudicate this issue. Specifically, what the Court ruled was, "to the extent a defendant claims protection under section 546(e) under a separate securities contract as a financial institution or financial participant, the bankruptcy court must adjudicate those claims in the first instance consistent with this

opinion." That's at page 10.

And the Court said "must." It didn't say "may." And the Barclays defendant and the other defendants that raised this second pathway laid out in their papers -- I argued this in front of Judge Morris, and we submitted the transcript as part of our motion papers on this motion. It was all laid out for the bankruptcy court. And what did the bankruptcy court do? It did not adjudicate these claims at all. It failed entirely to address this separate pathway.

And there's an important point to be made here, which is this actual knowledge issue that the trustee raised and the bankruptcy court agreed with as to Fairfield Sentry's actual knowledge that, you know, there was no trading of Madoff securities. Whatever relevance that may have in the context of a securities contract between Madoff Securities and Fairfield Sentry, it's got nothing to do with this second pathway, because the contracts, the securities contracts on which we are relying on for this second pathway are contracts between Fairfield Sentry and the subsequent transferees. Madoff is not a party to them.

And this is an important point as well, your Honor. Was Madoff a Ponzi scheme? Yes, we all know that now. Nobody has alleged that Fairfield Sentry was a Ponzi scheme. No one has alleged that the Fairfield Sentry shares that our clients bought and sold -- because, remember, we weren't dealing with

Madoff. We weren't dealing with Madoff Securities. We were dealing with Fairfield. Nobody has alleged that those were not actual shares. Nobody has alleged that the securities contracts between Fairfield Sentry and the defendants here, the subsequent transferee defendants were not valid securities contracts.

So it was really incumbent upon the bankruptcy court to address this issue, and it completely failed to address it. And that's particularly egregious, your Honor, because the bankruptcy judge ruled as she did on the first issue, the issue that Mr. Lack addressed -- she basically read us out of court on the basis that Fairfield Sentry had actual knowledge, that was all to do with the securities contracts between BLMIS, Madoff Securities and Fairfield, but she didn't even consider this other issue, which was fully briefed and fully argued and which your Honor said she must adjudicate.

Now, the trustee has an answer to it. Bankruptcy court, by the way, had no answer. The Court didn't say, I'm not reaching this issue because... We just don't know. But the trustee is now offering some after the fact rationalization which really don't wash.

So what the -- and this really goes to the point of whether there's substantial grounds for difference of opinion, right, because in the *Enron* case that we cite at page 14 of our brief, a Southern District case from 2006, a substantial ground

for difference of opinion exists where there is, quote, genuine doubt as to whether the bankruptcy court applied the correct legal standard. Okay?

Here -- that's the minimum. There's got to be genuine. Here we've got way more than genuine doubt. We know for a fact that the bankruptcy court refused or declined or ignored or whatever -- it did not apply the correct standard. This Court gave the bankruptcy court the standard, and the bankruptcy court just ignored it. That was -- now, as for these rationalizations, the main argument they make, the trustee makes, is, oh, well, that was a conditional ruling in *Cohmad*. It was a second ruling -- it was only there because, at the time *Cohmad* was decided in 2013, your Honor had ruled but the Second Circuit had not yet accepted that the securities -- that the BLMIS account agreements could function as securities contracts under 546(e).

And then in *Fishman*, which was decided the next year by the Second Circuit, the circuit said that your Honor was correct on that, and their view, at that point, the entire second holding of *Cohmad* falls away. It just magically disappears, because it became -- "academic" is the word that they use. And the reason they say that is just because, you know, they see no more use for that, but there very well may be a use for it.

For example, if your Honor were to rule that the

bankruptcy court got it right on the point Mr. Lack raised, then clearly the point that I'm now addressing would be a valid and viable argument. Similarly, if your Honor were to agree with us on the first point but the Second Circuit were to disagree that's a viable issue, so we were really entitled to a ruling by the bankruptcy court -- the bankruptcy court apparently thought they didn't have to answer this question. And what we're looking for now is what we thought we had in 2013, which is a clear instruction that these facts, as pleaded, satisfy this alternative pathway. And that is a valid way to get to 546(e), and it's a way that does not implicate the actual knowledge of Fairfield Sentry at all.

Again, our clients were actually dealing in real securities. They had reasonable expectations. They were legitimate security investors in a legitimate security. So whatever the issue was, Fairfield Sentry, and what it knew about Madoff, has nothing to do with whether we should be disentitled to 546(e) protection at a minimum under the second pathway.

THE COURT: Thank you very much. That's very helpful.

I'll hear now from the trustee.

MR. FEIL: Good evening, your Honor. Matthew Feil for the trustee.

I'll focus on the first question that Mr. Lack discussed, and my colleague, Mr. Calvani I think will address

the comments Mr. Gottridge just made.

With respect to the question one referring to Mr. Lack's comments, the defendants claim the court misapplied *Cohmad* by stripping them of their right to protections involved in 546(e). They argue that they have an independent right to assert that defense to avoidance even where that defense is not available to the initial transferee who received the transfer to be avoided; but defendants fail to identify the basis for this purported independent right.

They acknowledge that the two rulings in *Cohmad*, the two bottom line orders that your Honor put forth at the beginning, do not explicitly convey that right. The first part of the bottom line ruling precludes an initial transfer from asserting 546(e). All parties agree on that.

The second part of the bottom line order applies where there is an innocent initial transferee, one without actual knowledge. That provision doesn't apply here because all of these defendants received transfers from Fairfield Sentry, and the trustee's plausibly allege Fairfield Sentry's actual knowledge. Instead, defendants argue that this right is implicit in *Cohmad* for three reasons, and they ask this Court to now make that explicit.

First, they argue that *Cohmad's* one caveat, the part that bars a subsequent transferee with actual knowledge from asserting the innocent initial transferee's defense to 546(e)

provides them with their own defense to 546(e).

Second, they argue, as innocent subsequent transferees, they are who Congress intended for 546(e) to protect.

And, finally, they argue it would be unfair and inequitable to deny an innocent subsequent transferee protection of 546(e) simply because the initial transferee actual knowledge.

I'd like to address each of those in turn quickly if I may. First, the defendants argue that because *Cohmad* bars the subsequent transferee with actual knowledge from raising 546(e) the inverse must also be true, that a subsequent transferee without knowledge may raise 546(e) as a defense to avoidance, even whereas here the initial transferee cannot raise the defense because it had actual knowledge.

Your Honor's decision in *Cohmad* recognized that subsequent transferees have a due process right to challenge avoidance by asserting defenses available to the initial transferee, but this Court held there was one caveat to that rule in the context of 546(e), and this one caveat is the premise underlying that second part, the second bottom line ruling, which is that it prevents an innocent subsequent trans -- it prevents a subsequent transferee with actual knowledge from raising the defense that belongs to an innocent initial transferee.

As *Cohmad* explains, the one caveat applies when there is an innocent initial transferee, one without actual knowledge. Under the normal rule that is when a subsequent transferee has a due process right to raise defenses to avoidance. And the answer to -- the reason is because there is a defense to avoidance that the initial transferee has. The one caveat operates to restrict the subsequent transferee with actual knowledge from raising that otherwise valid defense to avoidance, and this is the only situation where your Honor, in the *Cohmad* decision, you discussed a subsequent transferee's actual knowledge of the fraud. Where that subsequent transferee is attempting to assert the valid defense of an innocent initial transferee, but if there's no innocent initial transferee, there's no valid 546(e) to assert by either the initial or the subsequent. And that's the situation here, your Honor.

There's no innocent initial transferee, and, thus, the 546(e) defense -- there's no 546(e) defense to be asserted to the avoidance of the initial transfer. The one caveat -- yes, your Honor?

THE COURT: Well, this is not addressed to anything you're talking about, but I guess I am a little surprised that, fine, you're right that it's not to your advantage to get this matter resolved sooner rather than later given this Court's well-known tendency to move very rapidly. So I guess it's --

I'm just wondering, as a practical matter, why, even if you're totally right, you don't want this matter promptly resolved.

MR. FEIL: We would like this matter promptly resolved, your Honor, but I think you've actually resolved it already once in a decision you issued almost contemporaneous with *Cohmad*. And that's a decision in this liquidation that you issued about 550(a), and I think the principles you laid out in that decision answered the question here. And I think your Honor can do that by simply denying their motion and saying you've answered that previously.

And if you like, I can walk you through that decision. I'm sure you remember it, but it really stands for the proposition that a subsequent transferee does have a due process right to assert defenses to avoidance but can only assert defenses that belong to the initial transferee.

And then to speak to what your Honor mentioned earlier when Mr. Lack was talking, is there is a defense for subsequent transferees. Congress has not left them in the cold. It's provided them what I would argue is a superior defense to 546(e), and it's more appropriate. So it's superior because it applies to all claims. It doesn't matter what the basis for avoidance was. The defense I'm talking about of course is 550(b). If they can demonstrate that they're an innocent transferee, they get to keep all of their transfer. It doesn't matter if it's within the two-year period, outside the two-year

period, whatever the basis for avoidance is. And I would submit that that's the more appropriate defense for them.

546(e) talks about protecting transfers. 550(b) talks and focuses on a defendant's good faith and lack of knowledge, and that's essentially what they're arguing is they're saying we were innocent, we didn't have that knowledge. The appropriate place for them to make that argument is under 550(b).

THE COURT: All right.

MR. FEIL: You know, they haven't really gotten into it today, but they also made a fairness argument. I think it's sort of the subsumed in what I just said, because the argument is getting late, I'll defer to my colleague who's going to address the comments Mr. Gottridge made about the second part of the argument.

THE COURT: That sounds fine.

MR. CALVANI: Good afternoon, your Honor. Torello Calvani from Baker Hostetler.

I want to focus my remarks on the second question presented. On this question, defendants argue that their knowledge to determine the application of Safe Harbor and consequently the avoidability of the initial transfer -- shall I speak up?

So on the second question, defendants argue that their knowledge should control the Safe Harbor and the voidability

from the BLMIS to Fairfield Sentry because they too are qualifying participants with qualifying transactions under section 546(e).

I would like to begin with why there's no substantial ground for difference of opinion. The bankruptcy court was correct in rejecting this argument. First, the argument is defendant's reading of *Cohmad* conflicts with the overall structure of the Bankruptcy Code's avoidance and recovery provisions.

I want to start very briefly with a couple of basic principles. One, the transfer the trustee must prove is avoidable is the transfer of property from debtor, and for purposes of the Safe Harbor, quote, the only relevant transfer is the transfer the trustee must seek to avoid. Here that transfer is the transfer from BLMIS to Sentry, and defendants do not argue otherwise.

Nevertheless, defendants argue that their knowledge should govern the Safe Harbor and avoidance, but defendants cited no case in which a court has held a subsequent transferee's knowledge should determine the avoidability of an initial transfer. This is because it is well-established that the concepts of avoidance and recovery are separate and distinct.

Now defendants say they are not conflating avoidance and recovery. The defendants say in their papers we've put

forth a strawman argument, but, your Honor, I submit they are conflating avoidance and recovery because they are using a subsequent transferee's knowledge to determine avoidance.

Now, we made these arguments in our opposition, and in defendant's reply they did something, what I think is surprising. Now, in the reply, defendants claim that their proposed appeal over the application of the Safe Harbor is actually not about the avoidance of the initial transfer. They claim the proposed appeal, quote, poses no avoidability issue, and they claim that *Cohmad* is special in that it does not focus on the avoidability of the initial transfer.

Your Honor, I submit that this is an admission that if the Court applies the traditional framework of avoidance and recovery as set out in your Honor's 550(a) decision, then the bankruptcy court was correct in denying their motions to dismiss and this Court would be correct in denying their motion for interlocutory appeal.

Now, defendant's argument that *Cohmad* is special because it does not focus on avoidance of initial transfer is also flatly wrong. *Cohmad* concerns the application of the Safe Harbor, and the Safe Harbor concerns and focuses on the avoidance of the initial transfer.

Now, the argument that *Cohmad* is somehow different, special apart from the Bankruptcy Code is similar to an argument that the defendants made below where they said your

Honor was wrong in deciding *Cohmad*. They argue no actual knowledge defense to the Safe Harbor, because it's not in the text of the statute. I want to reiterate, however, that *Cohmad* focuses on the avoidance of the transfer, and there is a statutory basis for this which is tied to the language and purpose of statute. If a customer like Sentry knew that Madoff's customer agreements were a fiction, then we're no longer talking about a securities transaction and the factual predicates underlying the Safe Harbor to avoidance do not exist.

Now, your Honor, defendants claim that *Cohmad* provides a personal defense and that's why it's different, but avoidability -- avoidability of a transfer is an attribute -- excuse me, avoidability is an attribute of the transfer, not the parties. Now, avoidability does not change based on whether there are subsequent transfers or who those subsequent transfers might be.

Defendants concede in their papers that avoidability is an attribute of the transfer, not the party, under the Bankruptcy Code, but then they argue that the opposite is true here. Your Honor, this is also wrong. Avoidability, because it's an attribute of a transfer, once the transfer is avoided it does not become unavoided. The transfer might not be recoverable for a number of reasons, such as a defendant's good faith, but it does not change that it is avoidable.

Now, here Fairfield Sentry's knowledge rebuts the Safe Harbor and makes the transfer avoidable. Defendants chose to invest in Fairfield. It wasn't by happenstance. And for purposes of this motion, defendants do not challenge that Sentry had actual knowledge of Madoff's fraud. We are all in agreement here today that Sentry does not have reason to believe that Madoff was engaged in any securities transactions.

This has consequences. Fairfield Sentry's actual knowledge is an infirmity that travels with the transfer. Therefore, to accept the defendant's argument that this Court must disregard Fairfield Sentry's actual knowledge -- well, there's no basis for it under *Cohmad* or the bankruptcy court -- or the Bankruptcy Code. Excuse me.

Now, I would like to discuss for a moment Ida Fishman, because Mr. Gottridge brought it up. When we were before your Honor ten years ago, in *Katz* and *Grife* we were arguing that the Safe Harbor should not apply to any of the trustee's claims because Madoff was operating a Ponzi scheme. In *Katz* and *Grife*, your Honor squarely rejected this argument. And in *Ida Fishman* you were unanimously affirmed.

It is the law of the land that section 546(e) applies to all of the trustee's cases, because Madoff's agreements with his customers qualify as securities contracts and his transfers qualify as settlement payments. But while *Grife* was on appeal, your Honor decided *Cohmad*, which included the section that

Mr. Gottridge read from at the end of the opinion about financial institutions and third-party contracts.

Your Honor posed a hypothetical where a payment by a BLMIS customer to a subsequent transferee could in some circumstances be a qualifying transaction given the language under section 546(e). Your Honor, we acknowledge that the definition of a settlement payment or a securities contract under the statute is broad.

We acknowledge there can be more than one securities contract. We acknowledge that there is more than one way to activate the Safe Harbor. But, your Honor, this does not mean that the trustee has to plead the actual knowledge of every party who may have a third-party securities contract or who subsequently received a settlement payment down the line.

Now, the defendants argue today that under this Court's hypothetical, Sentry's knowledge is irrelevant, and the actual knowledge rule should apply to the defendants because of their own securities contracts. But the focus should remain on the initial transfer. The subsequent transferees only have an indirect right to challenge the avoidance. That's the take away from Judge Bernstein's decision in BMP where defendants argue that they were securities customers, Judge Bernstein rejected their argument that the Safe Harbor argument would apply to entire chain of securities customers.

We heard today Judge Morris was the first person to

address *Cohmad*. That is incorrect. We cite in our papers the 2018 opinion by Judge Bernstein where he interpreted *Cohmad*, and we submit was correct.

So, as I said before, the trustee plausibly alleged that Sentry's actual knowledge rebuts the Safe Harbor and that knowledge cannot be rebutted. The plain meaning of section 546(e) dictates that the relevant transfer is the transfer the trustee must seek to avoid.

Here the end transfer was the transfer from BLMIS to entry. That transaction was complete when BLMIS deposited customer property in Sentry's account. Therefore, the focus should remain on the initial transfer, and to do otherwise would disregard Sentry's actual knowledge. It would conflate avoidance and recovery and, frankly, it would be unworkable.

I would add further that the language in *Cohmad* about third-party contracts does not actually say what defendants needed to say. That even if section 546(e) applies, because of third-party contracts, then those third parties' actual knowledge of Madoff's fraud should determine the avoidance of the initial transfer.

This section of *Cohmad* does not mention the actual knowledge standard, and it certainly does not hold -- it's not a holding and it does not hold that the existence of a subsequent transferee's security contract renders the actual knowledge of the initial transfer moot.

So that's what I would submit on the second question presented. It's late in the day, but I would like to address, if I may, a couple of the 1292 factors.

THE COURT: Okay. Briefly, though.

MR. CALVANI: Briefly.

THE COURT: Because I have parties here and still another matter I have to turn to.

MR. CALVANI: Thank you, your Honor.

I just want to say the defendants cited *In re Flor*, of course from the Second Circuit. In that opinion, the Court said the mere presence of a disputed issue that is a question of first impression standing alone is insufficient to demonstrate a substantial ground for difference of opinion. If silence from the circuit is sufficient, interlocutory appeals would be the norm not the exception.

Second, the second question does not present a pure question of law. This Court would have to study the record and identify the various third-party contracts. The defendants have referenced subscription agreements, redemption requests. Other defendants have addressed Sentry's articles of association. The Court would have to determine whether these transfers made by BLMIS to Sentry were in connection with these contracts.

We have over a thousand transfers from Sentry to its subsequent transferees, so this will be no easy task. Instead,

to the extent it's relevant, it should be done on a complete record of a bankruptcy court having performed a tracing analysis.

And I would add that -- I guess I'll make this my last point. Thank you -- that defendants argue below that there is no actual knowledge exception, so they don't make that argument here today. So we're going to have to wait for yet another 546(e) appeal, and this is another reason to deny their motion and wait for a final order, so they can put all their section 546(e) arguments together in one appeal. Otherwise, we're not just going to have piecemeal litigation, we're going to have piecemeal appeals on section 546(e).

Thank you.

THE COURT: Thank you very much.

I am sure the appellants want to give a brief rebuttal, and I will allow that. But I will ask that it be brief, only because I have another matter.

MR. LEVIN: And I will comply with that request, your Honor.

THE COURT: All right.

MR. LEVIN: Let me just address *Flor*. In the Banque Syz' reply brief, we address why we think the trustee miscited that case. I won't go into it here because of the time.

Your Honor asked the question and Mr. Feil addressed the question: If there's a good faith defense, why do you need

the other defense. I think the answer to that is pretty simple. If Congress gives defendants two defenses, the Court's not really in a position to say, well, we don't really need the one, because Congress gave them the other. And our position is here Congress gave the defendants here not only the good faith defense, but the 546(e) defense.

And let me go to that, setting it up this way. We agree with the trustee that the 550(a) decision from this Court said that the subsequent transferees could assert any defense that an initial transferee could assert. So an initial transferee can ordinarily assert a 546(e) defense. Two year reach back, that's it, not six years. And the 546(e) rule in the statute is absolute. There are no exceptions.

Your Honor made sense of that by saying, yeah, Mr. -- I think it was Feil -- Mr. Calvani said if the defendant actually knew there was no securities contract, 546(e) should not be available to that defendant who knew. But look at *Fishman* and *Katz* and *Grife*.

In those cases, the defendants believe that there were securities contracts, even though there was in fact no securities being traded and no securities contracts. So the Second Circuit and this Court both said they get the protection of the 546(e) defense. The guilty innocent -- I'm sorry, the guilty initial transferee doesn't.

So now take the subsequent transferee who's innocent,

and the initial transferee who's not knowledgeable, let's just say, for lack of a better term. That subsequent transferee is in the same position with respect to the whole chain of transactions that the direct investors were in *Grife* and *Katz* and *Fishman*, where they believed there were contracts, securities contracts, even though Madoff was breeching them, and the mere fact that the initial transferee didn't know they were there doesn't disable the subsequent transferee from getting the same protection that the defendants in these other cases got.

As we put in our brief, the trustee should not be allowed to saddle the innocent with the disabilities of the guilty. And we think your Honor's ruling about knowledge is particular to the defense -- to the particular defendant and not to the whole chain of transactions where you have people who actually rely on those securities contracts, which is what 546(e) is designed to address.

THE COURT: Thank you very much.

MR. LEVIN: Thank you, your Honor.

THE COURT: I can't take any further argument, but I do want to thank counsel for both sides for this excellent argument. Of course I remember these cases like yesterday.

MR. LEVIN: As do we, Your Honor.

THE COURT: But I will delve into it in more depth and get you an opinion, or at least a bottom line order, by the end

of the month. I thank you all again, and, if I may, I will ask you, however, to clear out quickly, because we have another matter.

(Adjourned)